

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Larry and Wendy Beene

Chapter 7

Debtor(s).

Bky Case No.: 04-43893

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion before the Honorable Nancy C. Dreher, U.S. Bankruptcy Judge, at 10:30 a.m. on November 10, 2004, in Courtroom No.7 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street, in Minneapolis, Minnesota.

Any response to this motion must be filed and delivered not later than November 5, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than November 1, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays).
Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Larry and Wendy Beene

Chapter 7

Debtor(s).

Bky Case No.: 04-43893

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion, before the Honorable Nancy C. Dreher, U.S. Bankruptcy Judge, at 10:30 a.m. on November 10, 2004, in Courtroom No.7 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street, in Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than November 5, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than November 1, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays).

Local Bankruptcy Rule 9006-1. **UNLESS A RESPONSE OPPOSING THE MOTION IS
TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file

this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on July 14, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5.

Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors have listed the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors have listed three claims totaling \$278,300.00
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors have listed no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors have listed four claims totaling \$61,487.91.00.
- (d) The debts listed in the debtors' Schedule of Liabilities appear to be primarily consumer debt. These debts are comprised of credit incurred to purchase consumer items. *See* Debtors' Schedule F

8. On Schedule I, Current Income of Individual Debtor(s), the debtors have listed a Total Combined Monthly Net Income of \$4,252.07. However in review of copies of the debtors current

paycheck stubs their actual monthly net income is \$5,305.35^{1/}. This figure would also be consistent with the debtors' 2003 income of \$80,571.00, as shown on their federal income tax return. The debtors are married and have one seventeen year old dependent.

9. On Schedule J, Current Expenditures of Individual Debtor(s), the debtors have listed Total Monthly Expenses of \$4,461.27. Debtors expenses appear to be appropriate and no changes are needed.

10. Total Monthly Net Income of \$5,305.35 minus the Total Monthly Expenses of \$4,461.27 provides the debtors with a monthly disposable income of \$844.08. Over a 36 month chapter 13 plan the debtors would have \$30,386.88, which would repay 50% of their Unsecured Non-priority claims of \$61,487.91.

11. The debtors are currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future.

12. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

^{1/}For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee. The U.S. Trustee also may submit the pay stubs at any hearing on this motion.

Wendy Beene's current YTD Net Income is \$19,683.23 divided by the 40th weekly pay period = \$492.08 x 52 pay periods in year = \$25,588.16 divided by 12 months = \$2,132.35 per month.

Larry Beene's current YTD Net Income is \$29,289.05 divided by 40th pay period = \$732.23 x 52 = \$38,075.96 divided by 12 months = \$3,173.00 per month.

Total Combined Monthly Net Income \$5,305.35.

13. The United States Trustee may call Gregory P. Biedermann, Senior Bankruptcy Analyst, Office of U.S. Trustee, 1015 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, as a witness.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: October 15, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
MN ATTY No. 158410
(612) 664-5505
(612) 664-5516

VERIFICATION

I, Michael R. Fadlovich, attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: October 15, 2004

Signed: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Larry and Wendy Beene

Chapter 7

Debtor(s).

Bky Case No.: 04-43893

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

This memorandum is submitted pursuant to Local Rule 9013-2(a). It appears that dismissal of this Chapter 7 case is appropriate under 11 U.S.C. 707(b).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b)(1994). The United States Trustee bears the burden of showing substantial abuse.

In re Dubberke, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt"

is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly* (*In re Kelly*), 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debtor's debts are 100% consumer debts.

(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt* (*In re Huckfeldt*), 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b)

dismissal is also not relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In *In re Mathes*, the bankruptcy court held that the ability to repay 35% of the debtor's debt to unsecured creditors was a substantial abuse of the Bankruptcy Code. BKY 96-32602, slip op. at 8-9 (Bankr. D. Minn. August 21, 1996). The court took into consideration that the debtor would not suffer undue hardship by complying with a Chapter 13 plan, that the unsecured debt of the debtor was primarily credit card debt that was not incurred as the result of an emergency or other unforeseen contingency, that the conduct of the debtors by amending his schedules to increase his expenses after the Section 707(b) motion was filed was not credible. *Id.*, slip op. at 408.

On appeal, the District Court of Minnesota affirmed the Bankruptcy Court's decision. *Mathes v. Stuart (In re Mathes)*, Civil File No. 3-96-906, slip op. (D. Minn. July 2, 1997) The District Court held that the finding of substantial abuse with a 35% threshold was appropriate:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See

Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Id., slip op. at 6-7.

In the present case, the debtors have the ability to repay 50% of their general unsecured creditors in thirty six months. Their ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: October 15, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
MN ATTY No. 158410
(612) 664-5505
(612) 664-5516

CERTIFICATE OF SERVICE

In Re:)	
)	
Larry and Wendy Beene)	Bankruptcy No. 04-43893
)	
Debtor(s).)	Chapter 7 Case
)	
)	

I, Terri L. Frazer, declare under penalty of perjury that on October 15, 2004, I served a copy of the foregoing proposed Notice of Hearing on Motion to Dismiss Chapter 7 Case, Notice of Hearing and Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law and proposed Order by U.S. mail, postage prepaid, to each person named below:

Larry and Wendy Beene
4756 233rd Court NW
St. Francis, MN 55070

Larry LaRoue
312 Central Avenue, Suite 478
Minneapolis, MN 55414

John R. Stoebner
2500 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402

Dated: 10-15-04

By: 
Office of the United States Trustee

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Larry and Wendy Beene

Chapter 7

Debtor(s).

Bky Case No.: 04-43893

ORDER

At Minneapolis, Minnesota, the _____ day of _____, 2004.

This matter came before the Court for hearing on the Motion of the United States Trustee's Office for an Order dismissing this Chapter 7 case pursuant to 11 U.S.C. §707(b). Appearances were noted in the record.

Based on the motion filed by the U.S. Trustee, the schedules filed by the debtors under oath, and all the files, records and proceedings herein, IT IS HEREBY ORDERED:

That this Chapter 7 bankruptcy case is dismissed as a substantial abuse pursuant to 11 U.S.C. Section 707(b).

The Honorable Nancy C. Dreher
United States Bankruptcy Judge